A

# Nordin bin Mohd Zain v Glomac Alliance Sdn Bhd

B

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO BA-24NCVC-1811–12 OF 2019
TEE GEOK HOCK JC
10 NOVEMBER 2020

C

*Agreement — Sale and purchase agreement — Plaintiff purchased a unit of a two and half story linked house ('the said property') — Defendant was to complete construction and development of sold units at its own cost and expenses — No completion of construction done due to winding up of developer's company — Whether doctrine of res judicata prevented the issue raised due to previous court proceedings — Whether plaintiff was rightful owner of the said property — Whether plaintiff had proprietary right or interest in the said property — Whether plaintiff have locus standi to initiate action and had no cause of action against the defendant — Whether defendant's dissatisfaction to the progress payment for the said property was made and the principal agreement was bona fide*

D

E

A company known as Score Option Sdn Bhd ('Score Option') was the registered and beneficial owner of all that piece of leasehold property held under Geran HS(D) 112510 No PT 2063, Mukim and district of Petaling, Selangor ('the said land'). Another company known as Austral Development Sdn Bhd ('Austral Development') was granted the absolute right by Score Option to develop the said land into a housing development known as 'Austral Yarra Link'. By a sale and purchase agreement between the plaintiff, Austral Development and Score Option, the plaintiff purchased a two and a half story linked house known as Lot No 69 at Jalan Metro 1/10A ('the said property'). Austral Development confirmed they had received the payments for the said property and that they had no further claims against the said property. On 21 January 2011, the receivers and managers of Score Option entered into a sale and purchase agreement ('Glomac agreement') with the defendant, Glomac for a consideration of RM77m to sell the said land but strictly excluding 198 houses that were already sold by Austral Development to the purchasers. By section 5.02 of the Glomac agreement, the transfer of the said land to the defendant was subject to the right and interest of the existing purchasers of the sold units. The said property which was purchased by the plaintiff was one of the 198 sold units and listed at item No 14 of Appendix B to the Glomac agreement. Clause 7A.01 of the Glomac agreement imposed an obligation upon the defendant to complete the construction and development of the sold units at its own cost and expenses. Subsequently, both Score Option and Austral Development went into winding up and liquidators were appointed on 5 December 2014 and 20 January 2015. On 3 November 2015,

F

G

H

I

the defendant commenced the Shah Alam Sessions Court Suit No B52NCVC-259–11 of 2015 for declaration that the sale and purchase agreement dated 15 January 2015 was null and void and the declaration that the defendant was the rightful owner and registered and beneficial owner of the said property. The sessions court dismissed the defendant's claim against the plaintiff with cost. The defendant then filed an appeal to Shah Alam High Court and then to the Court of Appeal but was dismissed. In the present case, defendant objected to the plaintiff's claim in the originating summons on the ground of: (a) the doctrine of res judicata prevented the issue raised from being litigated due to the previous court proceedings; (b) the plaintiff did not have locus standi to initiate the action and had no cause of action against the defendant; and (c) the defendant was not satisfied that the progress payment for the said property was made and that the principal agreement was bona fide.

**Held**, allowing the plaintiff's claims with costs of RM20,000:

(1) It was well settled that a party was not allowed to re-litigate the matters or issues which or issues which was decided by the court in a previous suit or action and the doctrine of res judicata operated to bar a person from re-litigating the matter or issues previously decided by the court as between the same parties. Res judicata in the wider sense applied to issue which should have been, but not, raised in the previous proceeding save for exceptional circumstances. The plaintiff was not barred or estopped by res judicata from filing and maintaining the suit for recovery of the said property and related order which flowed from and were consequential upon the decisions of the courts in the previous suits. Res judicata did not apply to bar or estop the plaintiff from filing the suit to recover the same property which the courts in the previous suits was held that the property belonged to the plaintiff (see paras 29 & 35).

(2) In light of the fact that the plaintiff was adjudged as the rightful owner of the said property, the defendant had no proprietary right to or interest in the said property and the defendant still refused to sign a transfer and gave a vacant possession of the said property despite the said property was completely constructed, the court was of the considered view that all prayers of the plaintiff's originating summon were orders and reliefs flowing from or ancillary to or consequential upon the court's decision in the previous Suit No 259. As the true owner of the said property, the plaintiff was entitled to have the title of the said property transferred to him free from any encumbrances and vacant possession of the said property (see paras 39 & 57).

(3) The court accepted the general principle that a sanction must be specific and was not meant for multiple proceedings. The plaintiff was using the sanction for the present suit only and there was no question of the plaintiff's alleged or threatened use of the same sanction for another suit.

There was no other legal proceeding actual or imminent or threatened by the plaintiff against the defendant or any other person. The only factual question was whether the sanction obtained by the plaintiff was sufficiently specific for the present suit. As the plaintiff had locus standi and the court in the previous Suit No 259 decided that the plaintiff was the true beneficial owner of the said property and the defendant had no right or interest in the said property, the plaintiff had a good and valid cause of action against the defendant (see paras 42–44 & 51).

(4) The court rejected the defendant's argument against the fact that full payment was made by the plaintiff for the said property. The argument by the defendant against the bona fides of the principal agreement or the bona fides of the contra payment (see para 55).

**[Bahasa Malaysia summary**

Sebuah syarikat yang dikenali sebagai Score Option Sdn Bhd ('Score Option') adalah pemilik berdaftar dan diakui sah terhadap kesemua hartanah pegangan pajakan yang dimiliki di bawah Geran HS(D) 112510 No PT 2063, Mukim dan daerah Petaling, Selangor ('tanah tersebut'). Syarikat lain yang dikenali sebagai Austral Development Sdn Bhd ('Austral Development') diberi hak mutlak oleh Score Option untuk memajukan tanah tersebut menjadi pemajuan perumahan yang dikenali sebagai 'Austral Yarra Link'. Melalui perjanjian jual beli antara plaintif, Austral Development dan Score Option, plaintif membeli sebuah rumah berkembar dua dan setengah tingkat yang dikenali sebagai Lot No 69 di Jalan Metro 1/10A ('hartanah tersebut'). Austral Development mengesahkan bahawa mereka telah menerima pembayaran untuk hartanah tersebut dan bahawa mereka tidak mempunyai tuntutan lanjutan terhadap hartanah tersebut. Pada 21 Januari 2011, penerima dan pengurus Score Option menandatangani perjanjian jual beli ('perjanjian Glomac tersebut') dengan defendan, Glomac dengan balasan RM77 juta untuk menjual hartanah tersebut tetapi dengan syarat tidak termasuk 198 rumah yang sudah dijual oleh Austral Development kepada pembeli. Berdasarkan seksyen 5.02 perjanjian Glomac tersebut, pindahmilik tanah tersebut kepada defendan tertakluk kepada hak dan kepentingan pembeli yang sedia ada bagi unit yang telah dijual. Hartanah tersebut yang telah dibeli oleh plaintif adalah salah satu daripada 198 unit yang dijual dan disenaraikan pada item No 14 lampiran B perjanjian Glomac. Klausa 7A.01 perjanjian Glomac mengenakan tanggungjawab kepada defendan untuk menyelesaikan pembangunan dan pemajuan unit yang telah dijual melalui kos dan perbelanjaannya sendiri. Selepas itu, kedua-dua Score Option dan Austral Development digulungkan dan pelikuidasi dilantik pada 5 Disember 2014 dan 20 Januari 2015. Pada 3 November 2015, defendan telah memulakan tuntutan Mahkamah Sesyen Shah Alam No B52NCVC-259–11 Tahun 2015 untuk suatu deklarasi bahawa perjanjian jual beli bertarikh 15 Januari 2015 adalah tidak sah dan terbatal dan suatu deklarasi bahawa defendan adalah pemilik sah

dan berdaftar dan diakui sah. Mahkamah sesyen menolak tuntutan defendan terhadap plaintif dengan kos. Defendan kemudian memfailkan rayuan ke Mahkamah Tinggi Shah Alam dan kemudian ke Mahkamah Rayuan tetapi telah ditolak. Dalam kes semasa, defendan membantah tuntutan plaintif dalam saman pemula dengan alasan bahawa: (a) doktrin res judicata menghalang isu yang dibangkitkan daripada dibicarakan oleh kerana prosiding mahkamah sebelumnya; (b) plaintif tidak mempunyai locus standi untuk memulakan tindakan dan tidak mempunyai kausa tindakan terhadap defendan; dan (c) defendan tidak berpuas hati bahawa bayaran kemajuan untuk hartanah tersebut telah dibuat dan bahawa perjanjian utama adalah bona fide.

**Diputuskan**, membenarkan tuntutan plaintif dengan kos RM20,000:

(1) Ianya telah diputuskan bahawa pihak tidak dibenarkan untuk membicarakan semula perkara atau isu yang telah diputuskan oleh mahkamah dalam tuntutan atau tindakan sebelumnya dan doktrin res judicata beroperasi untuk menghalang seseorang untuk tidak membicarakan perkara atau isu yang sebelumnya telah diputuskan oleh mahkamah antara pihak yang sama. Res judicata dalam pengertian yang lebih meluas diguna pakai untuk isu yang seharusnya, tetapi tidak, dibangkitkan dalam prosiding sebelumnya kecuali untuk keadaan yang luar biasa. Plaintif tidak dihalang atau diestop oleh res judicata untuk memfailkan dan mengekalkan tindakan untuk mendapatkan kembali hartanah tersebut dan perintah terkait yang berasal dari dan berdasarkan kepada keputusan mahkamah dalam tuntutan sebelumnya. Res judicata tidak terpakai untuk menghalang atau estop plaintif dalam memfailkan tuntutan untuk mendapatkan kembali hartanah yang sama yang mana mahkamah dalam tuntutan sebelumnya memutuskan bahawa hartanah tersebut adalah milik plaintif (lihat perenggan 29 & 35).

(2) Berdasarkan kepada fakta bahawa plaintif telah diputuskan sebagai pemilik sah ke atas hartanah tersebut, defendan tidak memiliki hak pemilikan untuk atau kepentingan ke atas hartanah tersebut dan defendan masih enggan untuk menandatangani pindahmilik dan memberikan milikan kosong hartanah tersebut walaupun hartanah tersebut telah disiapkan sepenuhnya, mahkamah berpendapat bahawa kesemua tuntutan dalam saman pemula plaintif adalah perintah dan relif yang berasal dari atau berdasarkan atau berpunca daripada keputusan mahkamah dalam saman sebelumnya No 259. Sebagai pemilik sebenar hartanah tersebut, plaintif diberikan hak untuk mendapatkan hakmilik hartanah tersebut yang dipindahkan kepadanya tanpa sebarang bebanan dan milikan kosong hartanah tersebut (lihat perenggan 39 & 57).

(3) Mahkamah menerima prinsip umum bahawa sanksi harus spesifik dan tidak dimaksudkan untuk prosiding berganda. Plaintif hanya mengguna

pakai sanksi hanya untuk tindakan semasa dan tidak ada persoalan mengenai dakwaan atau ancaman oleh plaintif untuk menggunakan sanksi yang sama untuk tindakan yang lain. Tidak ada prosiding guaman lain yang sebenar atau akan berjalan atau didakwa oleh plaintif terhadap defendan atau orang lain. Satu-satunya persoalan fakta adalah sama ada sanksi yang diperoleh oleh plaintif cukup spesifik untuk tindakan semasa. Oleh kerana plaintif mempunyai locus standi dan mahkamah dalam tuntutan sebelumnya No 259 memutuskan bahawa plaintif adalah pemilik sebenar hartanah tersebut dan defendan tidak mempunyai hak atau kepentingan terhadap hartanah tersebut, maka plaintif mempunyai kausa tindakan yang wajar dan sah terhadap defendan (lihat perenggan 42–44 & 51).

(4) Mahkamah menolak hujahan defendan terhadap fakta bahawa pembayaran penuh telah dibuat oleh plaintif untuk hartanah tersebut. Hujahan oleh defendan terhadap bona fide perjanjian utama atau bona fide pembayaran kontra (lihat perenggan 55).]

**Cases referred to**

*Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783, SC (refd)

*Azman Zain bin Mohd Zain v CIMB Bank Bhd* [2012] MLJU 394; [2013] 6 CLJ 862, HC (folld)

*Chew Thai Kay & Anor v Tenaga Nasional Bhd* [2020] 7 MLJ 747; [2020] 1 CLJ 97, HC (folld)

*Hoystead v Commissioner of Taxation* [1926] AC 155, PC (refd)

*Malayan United Finance Bhd v Noormurni Sdn Bhd & Anor* [1988] 1 MLJ 395, SC (refd)

*Prestasia Sdn Bhd v Mow Wai Lan* [1997] 2 MLJ 236, CA (folld)

*Priyakumary Muthucumaru & Anor v Gunasingam a/l Ramasingam (a bankrupt)* [2006] 6 MLJ 511, CA (folld)

*Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494, SC (refd)

*Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] 2 WLR 690, PC (refd)

**Legislation referred to**

Housing Development (Control and Licensing) Act 1996 Schedule G
Housing Development (Control and Licensing) Regulations 1989
National Land Code Form 14A
Insolvency Act 1967 s 38, 38(1)

*T Nayagam (Nayagam & Partners) for the plaintiff.*
*Douglas Yee (Lim Pit Feng with him) (Douglas Yee) for the defendant.*

**Tee Geok Hock JC:**

INTRODUCTION

**[1]** It appears that the ordeal of this man of little means will not end with the decision of this court on 15 September 2020, although this is the fourth time he has come to the courts to seek justice.

**[2]** In the present commenced by originating summons, the plaintiff/Nardin sought the following orders:

(a) a declaration that the plaintiff is the legal and beneficial owner of a two and half (2 1/2) story linked house known as Lot No 69, (Jalan Metro 1/10A) measuring approximately 153 sqmt in the Austral Yarra Link housing development ('said property') which was purchased by way of a sale and purchase agreement dated 15 January 2010 between the plaintiff, Austral Development Sdn Bhd (Company No 638830-A) and Score Option Sdn Bhd (Company No 550356-V);

(b) an order that within 14 days of this order the defendant take all steps required to vest the legal and beneficial ownership of the said property on the plaintiff by executing all necessary documents including but not limited to the memorandum of transfer (Form 14A) in favour of the plaintiff;

(c) an order that if the defendant fails to coply with Prayer No 2 hereinabove within 14 days of this order, the deputy registrar of the Shah Alam High Court is authorised to execute all necessary legal documents including but not limited to the memorandum of transfer (Form 14A) in favour of the plaintiff to vest the legal and beneficial ownership of the said property on the plaintiff;

(d) an order that the defendant within 14 days of this order forward to the plaintiff's solicitors all security documents including but not limited to the issue document of title and any other document necessary to vest the legal and beneficial ownership of the said property on the plaintiff;

(e) an order that within 14 days of this order the defendant deliver vacant possession of the said property to the plaintiff;

(f) the cost of this action is paid by the defendant to the plaintiff; and

(g) any further or other reliefs deemed fair and just by this honorable court.

**[3]** Prior to this suit, the plaintiff/Nardin was sued by the defendant/Glomac in Shah Alam Sessions Court Suit No B52NCvC-259–11 of 2015 ('the previous Suit No 259') whereby Glomac sought for the following orders:

(a) a declaration that the sale and purchase agreement dated 15 January 2015 between Austral Development Sdn Bhd (as vendor), Score Option Sdn Bhd (as proprietor) and Nordin (as purchaser) in respect of ten unit of 2 1/2 storey residential house ('the said property') was null and void; and

(b) a declaration that Glomac was the rightful owner and/or registered owner of the said property.

**[4]** In the previous Suit No 259, Nordin filed a defence but did not add a counterclaim for a declaration that Nordin was the rightful owner or for any consequential relief.

**[5]** The previous Suit No 259 of the Glomac was dismissed by the sessions court.

**[6]** On appeal to the High Court vide Shah Alam High Court Civil Appeal No BA-12BNCVC-34–06 of 2017 ('High Court Appeal No 34'), the High Court dismissed Glomac's appeal and affirmed the session court's decision.

**[7]** Glomac's further appeal to the Court of Appeal in that case was also dismissed by the Court of Appeal.

BACKGROUND

**[8]** A company known as Score Option Sdn Bhd ('Score Option') was the registered and beneficial owner of all that piece of leasehold property held under Geran HS(D) 112510 No PT 2063, Mukim and District of Petaling, Selangor Darul Ehsan measuring approximately 200 acres ('said land').

**[9]** Another company known as Austral Development Sdn Bhd ('Austral Development') was granted the absolute right by Score Option to develop the said land into a housing development known as 'Austral Yarra Link'.

**[10]** By a sale and purchase agreement dated 15 January 2010 ('principal agreement') between the plaintiff, Austral Development and Score Option, the plaintiff purchased a two and half (2 1/2) story linked house known as Lot No 69 (Jalan Metro 1/10A) measuring approximately 153 sqmt in the Austral Yarra link housing development ('said property'). See pp 80–103 of exh 'NMZ1' to the plaintiff's affidavit in support.

**[11]** By letter dated 15 January 2010, Austral Development confirmed that they 'have fully received the payments for the' said property and that they have no further claims against the said property. By way of the same letter, Austral

Development also forwarded the original copy of the sale and purchase agreement and deed of mutual covenant to the plaintiff. See p 186 of exh 'NMZ1' of the plaintiff's affidavit in support.

**[12]** Receivers and managers ('receivers and managers') of Score Option were appointed on 29 January 2010 pursuant to a debenture dated 10 April 2008 between Malayan Banking Bhd and Score Option.

**[13]** On 21 January 2011, the receivers and managers of Score Option entered into a sale and purchase agreement ('Glomac agreement') with Glomac for a consideration of RM77m to sell the said land but strictlly excluding 198 houses ('sold units') that were already sold by Austral Development to purchasers in the Austral Yarra Link Development: pp 104–178 of exh 'NMZ1' to the plaintiff's affidavit in support.

**[14]** By section 5.02 of the Glomac agreement, the transfer of the said land to the Glomac was subject to the right and interest of the existing purchasers of the sold units. See p 119 of exh 'NMZ1' to the plaintiff's affidavit in support.

**[15]** The said property which was purchased by Nordin is one of the 198 sold units and listed at item No 14 of Appendix B to the Glomac agreement. See p 140 of exh 'NMZ1' to the plaintiff's affidavit in support.

**[16]** Clause 7A.01 of the Glomac agreement also imposed an obligation upon the Glomac to complete the construction and development of the sold units at its own cost and expenses. See pp 121–122 of exh 'NMZ1' to the plaintiff's affidavit in support.

**[17]** Further thereto, Glomac gave effect to these obligation as set out in cll 5.02 and 7A.01 by transferring legal and beneficial ownership to other purchasers of such sold units as demonstrated in pp 373–421 of exh 'NMZ1': see pp 373–421 of exh 'NMZ1'.

**[18]** The typical mode of dealing with other purchasers was that Glomac executed two agreements with another purchaser of a sold unit, whereby:

(a) a sale and purchase agreement dated 17 October 2014 was executed between the purchaser and Glomac (pp 373–396) for Glomac to buy the sold unit from the purchaser; and

(b) a sale and purchase agreement dated 28 July 2015 was executed between the purchaser and Glomac as a developer. This agreement was pursuant to Schedule G of the Housing Development (Control and Licensing) Act 1996 and Housing Development (Control and Licensing) Regulations 1989 (pp 397–421).

**[19]** It is pertinent to note here that the developer under the principal agreement, Austral Development Sdn Bhd, is not a party to both the above said agreements.

**[20]** As outlined above, Glomac by its conduct has given effect to section 7A.01 of the Glomac agreement by dealing directly with purchasers of the sold units, to the exclusion of Austral Development Sdn Bhd.

**[21]** The High Court in the previous proceedings made a finding of fact that 'following the literal and unambigous reading of section 7A.01(a)(i) of the Glomac agreement clearly stated that Glomac is to complete the construction and development of the uncompleted sold units at its own cost and expenses'. The relevant part of the High Court's grounds of judgment is at p 10 of exh 'NMZ2' to the plaintiff's affidavit in support.

**[22]** Glomac's direct dealing with the purchasers of the sold units, was also confirmed by the deponent of Glomac's affidavit in reply, Andrew R Sundram a/l Michael Julian, during his testimony at the trial in the sessions court.The relevant oral evidence is at Q&A 21 at pp 29–30 of exh 'NMZ1' to the plaintiff's affidavit in support.

**[23]** Subsequently both Score Option and Austral Development went into winding up and liquidators were appointed on 5 December 2014 and 20 January 2015 respectively.

**[24]** On 3 November 2015, Glomac commenced the Shah Alam Sessions Court Suit No B52NCVC-259–11 of 2015 against Glomac for the following main reliefs:

(a) a declaration that the SPA dated 15 January 2015 is null and void; and

(b) a declaration that Glomac is the rightful owner and/or registered and beneficial owner of the said property.

**[25]** After a full trial, on 30 May 2017, the sessions court dismissed Glomac claim against the plaintiff with cost. See pp 535–537 of exh 'NMZ1' of the plaintiff's affidavit in support.

**[26]** On 7 June 2017, Glomac filed an appeal to the Shah Alam High Court against the decision of the Shah Alam sessions court. Glomac's appeal was dismissed with cost on 6 June 2018. See pp 18–19 of exh 'NMZ1' to the plaintiff's affidavit in support.

**[27]** On 29 June 2018 Glomac filed an appeal to the Court of Appeal against the decision of the Shah Alam High Court. The Court of Appeal on 31 May 2019 dismissed Glomac's appeal with cost. See pp 1–2 of exh 'NMZ3' to the plaintiff's affidavit in support.

GLOMAC'S ARGUMENTS AGAINST NORDIN'S ORIGINATING SUMMONS HEREIN

**[28]** Glomac's objections to Nordin's claim in the originating summons herein are premised on the following issues:

(a) the doctrine of res judicata prevents the issues raised in this action from being litigated due to the previous court proceedings;

(b) Nordin does not have the locus standi to initiate this action and has no cause of action against the defendant; and

(c) Glomac is not satisfied that the progress payment for the said property has been made and/or that the principal agreement was bona fide.

RES JUDICATA

**[29]** It is well-settled law that a party is not allowed to re-litigate the matters or issues which has been decided by the court in a previous suit or action, and the doctrine of res judicata operates to bar a person from re-litigating the matter or issues previously decided by the court as between the same parties. Res judicata in the wider sense also applies to issues which should have been, but not, raised in the previous proceeding save for exceptional circumstances. Decided authorities include *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 (SC); *Hoystead v Commissioner of Taxation* [1926] AC 155 at pp 165–166 (PC); *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] 2 WLR 690 (PC). In *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd*, the Federal Court also followed Eusoffe Abdoolcader FCJ's judgment in *Superintendent of Pudu Prison & Ors v Sim Kie Chon* [1986] 1 MLJ 494 at p 498 that estoppel *per rem judicatum* need not be pleaded.

**[30]** In addition to res judicata, issue estoppel also applies to estop a party from re-litigating the findings of fact which the court has previously decided between the same parties: *Malayan United Finance Bhd v Noormurni Sdn Bhd & Anor* [1988] 1 MLJ 395 at p 396 (SC); *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 (SC).

**[31]** In *Prestasia Sdn Bhd v Mow Wai Lan* [1997] 2 MLJ 236 at p 250 the Court of Appeal held that where a defendant has filed a counterclaim in the previous suit but the court did not decide or adjudged on the defendant's

counterclaim after having dismissed the plaintiff's claim in the previous suit, the successful defendant can file a subsequent suit for such counterclaim and the subsequent suit for such counterclaim and the subsequent suit to claim for the same subject matter and claim in the counterclaim is not barred by res judicata. This principle is good law, and is consistent with the policy against re-litigation on account of res judicata.

**[32]** In our present case, Nordin did not make a counterclaim for declaration that he is the right owner of the said property, and hence the sessions court in the previous Suit No 259 did not give any judgment on any counterclaim.

**[33]** Nevertheless, in the course of delivering judgment in the previous Suit No 259, the sessions court has expressly held that Glomac was not the rightful owner of the said property and has also expressly and/or impliedly found and concluded that Nordin has been the rightful owner of the said property at all material times. Such findings and/or conclusions of Nordin's rightful ownership to the said property are evident from the following extracts of the session court's ground of judgment:

(a) the court finds that Nordin is the beneficial owner of the said property: see p 24 thereof;

(b) Glomac's purchase from the receiver and manager of Score Option did not include the 198 Sold Units, and Nordin's said property unit No 69 (Jalan Metro 1/10A) is one of the 198 sold units: see pp 28–29 thereof;

(c) Glomac is not the registered proprietor or beneficial owner of the said property: p 31 thereof;

(d) Glomac's rights did not include the 198 sold units, and no consideration was paid by Glomac for the sold units: see p 34 thereof; and

(e) the court finds that Glomac has not merit to claim the unit which was owned by Nordin legally and bona fide: p 35 thereof.

**[34]** In dismissing the Glomac's appeal and affirming the sessions court's decision, the High Court in the High Court Civil Appeal No 34, inter alia, stated as follows:

> This court finds that (Glomac) has no interest, no locus standi, on the sold units': see para [16] at p 10 of the High Court's grounds of judgment.

**[35]** As Nordin did not make any counterclaim in the previous suit and the sessions court in the previous suit did not decide on any counterclaim, this court holds and conclude that following the Court of Appeal's decision in *Prestasia Sdn Bhd v Mow Wai Lan* [1997] 2 MLJ 236 at p 250, Nordin is not barred or estopped by res judicata from filing and maintaining the present suit

for recovery of the said property and related orders which flow from and/or are consequential upon the decisions of the courts in the previous suit. Further or alternatively, due to the exceptional circumstances of the present case, res judicata in the wider sense does not apply to bar or estop Nordin from filing the present suit to recover the very same property which the courts in the previous Suit No 259 have held that the property belonged to Nordin.

**[36]** As the courts in the previous suit have decided that Nordin is the true owner of the said property and Glomac has no right to or interest in the said property and the appeal has been exhausted, Glomac is barred or estopped by res judicata from re-litigation or re-opening the ownership issue in our present suit. Moreoever, issue estoppel also applies to bar or estop Glomac from re-litigating or re-contesting the findings and conclusions of the courts in the previous suit as summarised in paras 33 and 34 above.

**[37]** In the premises, this court has the jurisdiction to make orders and grant reliefs in favour of Nordin that flow from or are consequential upon or ancillary to the decision of the courts in the previous suit.

**[38]** In our present case, Nordin in his originating summons prays for the following orders and/or reliefs:

(a) a declaration that the plaintiff is the legal and beneficial owner of a two and half (2 1/2) story linked house known as Lot No 69, (Jalan Metro 1/10A) measuring approximately 153 sqmt in the Austral Yarra Link housing development ('said property') which was purchased by way of a sale and purchase agreement dated 15 January 2010 between the plaintiff, Austral Development Sdn Bhd (Company No 638830-A) and Score Option Sdn Bhd (Company No 550356-V);

(b) an order that within 14 days of this order the defendant take all steps required to vest the legal and beneficial ownership of the said property on the plaintiff by executing all necessary documents including but not limited to the memorandum of transfer (Form 14A) in favour of the plaintiff;

(c) an order that if the defendant fails to comply with Prayer No 2 hereinabove within 14 days of this order, the deputy registrar of the Shah Alam High Court is authorised to execute all necessary legal documents including but not limited to the memorandum of transfer (Form 14A) in favour of the plaintiff to vest the legal and beneficial ownership of the said property on the plaintiff;

(d) an order that the defendant within 14 days of this order forward to the plaintiff's solicitors all security documents including but not limited the

issue document of title and any other document necessary to vest the legal and beneficial ownership of the said property on the plaintiff;

(e) an order that within 14 days of this order the defendant deliver vacant possession of the said property to the plaintiff;

(f) the cost of this action is paid by the defendant to the plaintiff; and

(g) any further or other reliefs deemed fair and just by this honorable court.

**[39]** In light of the fact that: (a) Nordin has been adjudged as the rightful owner of the said property; (b) the court in the previous Suit No 259 has conclusively held that Glomac has no proprietary right to or interest in the said property; (c) the said property has been completely constructed but Glomac, who is holding on to the possession and document of titles of the said property, still refuses to sign a transfer of the said property to Nordin and further refuses to give vacant possesion of the said property to Nordin, this court is of the considered view that all the prayers (1) to (6) of Nordin's originating summons are orders and/or reliefs flowing from or ancillary to or consequential upon the court's decision in the previous Suit No 259.

LOCUS STANDI AND CAUSE OF ACTION

**[40]** Glomac also argued that Nordin allegedly has no locus standi to initiate this action and has no cause of action against Glomac.

**[41]** In challenging Nordin's locus standi, Glomac cited the following decided authorities:

(a) *Priyakumary Muthucumaru & Anor v Gunasingam a/l Ramasingam (a bankrupt)* [2006] 6 MLJ 511 wherein the Court of Appeal held that there must be a written sanction from the official assignee before an undischarged bankrupt can file a suit and that the presence of the officer from the office of the official assignee in court in the proceedings did not show implied consent to continue with the proceedings; and

(b) a sanction must be specific to an action.

**[42]** This court accepts the general principle that a sanction must be specific and is not meant for multiple proceedings: *Chew Thai Kay & Anor v Tenaga Nasional Bhd* [2020] 7 MLJ 747; [2020] 1 CLJ 97.

**[43]** In our present case, Nordin is using the sanction for the present suit only, and there is no question of Nordin's alleged or threatened use of the same sanction for another suit. There is no other legal proceeding actual or imminent or threatened by Nordin against Glomac or any other person.

**[44]** The only factual question in our present case is whether the sanction obtained by Nordin is sufficiently specific for our present suit.

**[45]** In *Azman Zain bin Mohd Zain v CIMB Bank Bhd* [2012] MLJU 394; 2013 6 CLJ 862, Mary Lim J (now FCJ) held that the sanction can take many forms and no particular format is required, though it should generally be in writing: see para [11].

**[46]** In *Priyakumary Muthucumaru & Anor v Gunasingam a/l Ramasingam (a bankrupt)* [2006] 6 MLJ 511, the Court of Appeal relied partly on the confirmation by the DGI's representative in the court that no formal application was ever made by the undischarged bankrupt in that case before coming to the decision that there was no sanction from the DGI in that case. This shows that the court can consider information and confirmation of the DGI's representative who appears in court for the proceedings. In *Chew Thai Kay & Anor v Tenaga Nasional Bhd* [2020] 7 MLJ 747; [2020] 1 CLJ 97, the High Court was faced with a written consent which was not expressed in clear wording or free from ambiguity. In *Chew Thai Kay*'s case, Mohd Radzi Harun JC refered to another written sanction for another separate case and held that although the file number of the case was left blank, the sanction when read in the contexst was a specific sanction for the case in question and was valid: see paras [13]–[20].

**[47]** From the decided authorities, the following principles can be gleaned regarding the sanction of the Director-General of Insolvency ('DGI') for the commencement and continuation of a court suit or action:

(a) before there can be a sanction to be issued, there must be a written application by or on behalf of the applicant to the DGI: s 38 of the Bankruptcy Act and *Priyakumary Muthucumaru & Anor v Gunasingam a/l Ramasingam (a bankrupt)* [2006] 6 MLJ 511;

(b) the sanction issued by the DGI must be specific for a suit or action: *Priyakumary Muthucumaru & Anor v Gunasingam a/l Ramasingam (a bankrupt)* [2006] 6 MLJ 511;

(c) the sanction can take many forms and no particular format is required, though it should generally be in writing: *Azman Zain bin Mohd Zain v CIMB Bank Bhd* [2012] MLJU 394; 2013 6 CLJ 862 para [11];

(d) mere presence of DGI's representative at a proceeding in the suit or action by itself does not constitute the DGI's sanction for that suit or action: *Priyakumary Muthucumaru & Anor v Gunasingam a/l Ramasingam (a bankrupt)* [2006] 6 MLJ 511;

(e) where the wording of the written sanction of DGI is ambiguous or imperfect, the confirmation of the DGI's representative in the court and

the extrinsic evidence in other related documents can be taken into consideration by the court in deciding whether or not the DGI has in fact given a specific sanction for the suit or action in question: *Priyakumary Muthucumaru & Anor v Gunasingam a/l Ramasingam (a bankrupt)* [2006] 6 MLJ 511; *Azman Zain bin Mohd Zain v CIMB Bank Bhd* [2012] MLJU 394; [2013] 6 CLJ 862 at para [10] and *Chew Thai Kay & Anor v Tenaga Nasional Bhd* [2020] 7 MLJ 747; [2020] 1 CLJ 97 paras [13]–[20]; and

(f) analogous with interpretation of contract terms or written law, it is in principle not objectionable for external aids to be used in interpretation of a written consent or sanction.

**[48]** In our present case, the facts and events in connection with the question of consent were as follows:

(a) on 16 May 2018, Nordin was adjudged a bankrupt;

(b) by solicitor Nayagam & Partner's letter dated 4 October 2019, Nordin applied to director-general of insolvency ('DGI') under s 38(1) of Bankruptcy Act 1967 for consent to commence this suit against Glomac: see exh 'NMZ1' to plaintiff's *afidavit jawapan* affirmed on 18 February 2020. The contents of Nayagam & Partner's letter dated 4 October 2020 are as follows:

Per: Permohonan Bankrap Untuk Sanksi Di Bawah Seksyen 38(1)(a) Akta Kebankrapan 1967
Tindakan Yang Di Cadangkan Terhadap Glomac Alliance Sdn Bhd oleh Nordin Bin Md Zain

Kami merujuk kepada perkara tersebut di atas di mana kami mewakili Nordin Bin Md Zain.

Bersama-sama surat ini melampirkan dokumen-dokumen berikut untuk permohonan sanksi:-

i) Borang A;
ii) Sesalinan Aku Janji Bankrap oleh Nordin Bin Md Zain;
iii) Sesalinan Aku Janji Peguam oleh Thisinayagam A/L A. Somasundram;
iv) Kronologi dan Fakta Kes;
v) Merit Kes;
vi) Kausa Tindakan;
vii) Perjanjian Jual beli Bertarikh 15.1.2010
viii) Perjanjian Jual Beli Bertarikh 21.1.2011
ix) Surat kami bertarikh 10.7.2019

Sila akui penerimaan di sesalinan surat ini.

(c) in response, DGI by letter dated 9 October 2018 asked Nordin's solicitors to provide more information and documents including cause papers (such as writ of summons, statement of claim, etc) and statement of affairs: see exh 'NMZ2'; this DGI's letter referred to Nayagam & Partners' letter reference NP/L/655/NMZ/2015;

(d) by letter reference NP/L/655/NMZ/2015 dated 21 October 2019, Nordin's solicitors provided to the DGI draft originating summons and draft affidavit in support of Nordin. The contents of Nayagam & Partner's letter dated 21 October 2019 were as follows:

Per: Permohonan Bankrap Untuk Sanksi Di Bawah Seksyen 38(1)(a) Akta Kebankrapan 1967
Tindakan Yang Di Cadangkan Terhadap Glomac Alliance Sdn Bhd oleh Nordin Bin Md Zain

Kami merujuk kepada perkara tersebut di atas di mana kami mewakili Nordin Bin Md Zain. Kami juga merujuk kepada surat kami bertarikh 4.10.2019 dan surat tuan bertarikh 9.10.2019.

Seperti yang diarahkan, bersama-sama surat ini kami melampirkan dokumen-dokumen berikut untuk tindakan lanjut tuan:-

i) Borang A;
ii) Sesalinan Aku Janji Bankrap oleh Nordin Bin Md Zain;
iii) Sesalinan Aku Janji Peguam oleh Thisinayagam A/L A. Somasundram;
iv) Kronologi dan Fakta Kes;
v) Merit Kes;
vi) Kausa Tindakan;
vii) Perjanjian Jual beli Bertarikh 15.1.2010
viii) Perjanjian Jual Beli Bertarikh 21. 1.2011
ix) Surat kami bertarikh 10.7.2019

Sila akui penerimaan di sesalinan surat ini.

(see exh 'NMZ3') This letter was received by DGI on 25 October 2019 with the DGI's rubber stamp affixed and date of receipt stamped thereon as 25 October 2019;

(e) by letter dated 31 October 2019 and referring to Nordin's solicitors' reference NP/L/655/NMZ/2015, the DGI issued the written sanction in the following words:

DALAM PERKARA KEBANKRAPAN NO. BA-29NCC-8236-09/2017
BER : Nordin Bin Md Zain
NO. K/P : 490729-04-5129
MAHKAMAH TINGGI DI SHAH ALAM
GUAMAN NO. : BELUM DIFAILKAN
TARIKH PENDENGARAN KES: BELUM DITETAPKAN
PERMOHONAN DI BAWAH SEKSYEN 38(1)(a) AKTA INSOLVENSI 1967

Saya dengan hormatnya di arah merujuk kepada perkara di atas dan surat tuan bertarikh 25.10.2019.

2. Adalah dimaklumkan bahawa Ketua Pengarah lnsolvensi telah meluluskan sanksi untuk tuan memulakan dan meneruskan tindakan di Mahkamah Tinggi di Shah Alam bagi Guaman No.: Belum difailkan dan melantik Tetuan Nayagam & Partners untuk mewakili tuan dalam tindakan guaman tersebut dan rayuan-rayuan yang berbangkit daripada kes ini.

3. Sila ambil maklum perkara-perkara yang berikut:

(a) Ketua Pengarah lnsolvensi Malaysia tidak akan bertanggunjawab dan tidak boleh dipertanggungkan sama sekali atas apa-apa kegagalan, kerugian dan apa-apa kos yang terlibat atau yang dikenakan oleh mana-mana pihak yang terlibat dalam dan/atau yang berbangkit daripada guaman tersebut dan kegagalan, kerugian dan apa-apa kos hendaklah ditanggung oleh Bankrap sendiri;

(b) Sekiranya keputusan Mahkamah dalam tindakan guaman tersebut memihak kepada tuan, apa-apa wang, pampasan dan faedah yang diterima oleh tuan hendaklah diserahkan kepada Ketua Pengarah lnsolvensi Malaysia untuk dimasukkan ke dalam estet kebankrapan tuan bagi faedah pemiutang-pemiutang;

(c) Pihak tuan hendaklah memaklumkan kepada Ketua Pengarah lnsolvensi berhubung dengan rayuan yang akan difailkan ke Mahkamah yang lebih tinggi. Sekiranya pihak tuan yang memulakan rayuan, sesalinan notis rayuan hendaklah diserahkan kepada cawangan Jabatan lnsolvensi Malaysia yang mengeluarkan sanksi;

(d) Sebarang perlukaran peguamcara/firma guaman yang mengendalikan kes/rayuan hendaklah dimaklumkan kepada Ketua Pengarah lnsolvensi dan peguamcara yang baru hendaklah mengemukakan sanksi yang baru; dan

(e) Keputusan rayuan kes hendaklah dimaklumkan kepada Ketua Pengarah lnsolvensi.

Sekian, terima kasih.

(see exh 'NMZ4'.)

(f) through Nayagam & Partner's letter reference NP/L/655/NMZ/2015 dated 25 November 2019 (received by Glomac on 28 November 2019), Nordin's solicitors served the notice demand on Glomac together with a copy of DGI's sanction letter dated 31 October 2019: see exh 'NMZ5'; and

(g) this suit was filed by Nordin on 29 January 2020. By Glomac's solicitor's letter dated 31 January 2020, Glomac for the first time raised objection to DGI's sanction on ground that it did not name Glomac as the defendant and did not state the scope and type of proceedings sanctioned: see exh 'NMZ6'.

**[49]** In the course of proceedings in the present suit, representatives of DGI at several occasions attended court and confirmed that the sanction of DGI was for the specific purpose of Nordin's suit against Glomac in connection with the said property, including the following confirmations:

(a) on 21 February 2020, DGI's representative Cik Fatin Khairi attended case management before the registrar and confirmed that sanction for this suit was obtained by Nordin on 31 October 2019 before the commencement of this suit consistent with s 38(1) of the Insolvency Act 1967 (see para 6(i) of plaintiff's *afidavit tambahan* affirmed on 16 March 2020);

(b) on 21 February 2020 Cik Fatin Khairi also confirmed to the court that she had perused the originating summons and affidavit in support filed in the present suit by comparing with the draft originating summons and draft affidavit in support which were sent to DGI by Nordin's solicitors on 25 October 2019 in exh 'NMZ3' and found them to be identical: para 6(ii) of plaintiff's *afidavit tambahan* affirmed on 16 March 2020;

(c) in the written submission filed by DGI's representative on 3 June 2020 (court encl 27), the DGI's representative confirmed in writing that the DGI's sanction dated 31 October 2019 was specifically for Nordin's present suit against Glomac in respect of the said property, and, according to the DGI's office, is a valid sanction; and

(d) at the hearing of the originating summons on 7 September 2020. DGI's representative attended court and confirmed again that the DGI's sanction dated 31 October 2019 was specifically for this suit by Nordin against Glomac, the draft originating summons and draft affidavit in support sent together with Nayagam & Partner's letter dated 21 October 2019 were identical with the originating summons and affidavit in support filed herein, and that Nordin has made a formal application for the sanction to file this suit against Glomac but Nordin did not, and has not, applied to DGI for any other suit or proceeding.

**[50]** Applying the principles decided in *Azman Zain bin Mohd Zain v CIMB Bank Bhd* [2012] MLJU 394; [2013] 6 CLJ 862, *Priyakumary Muthucumaru & Anor v Gunasingam a/l Ramasingam (a bankrupt)* [2006] 6 MLJ 511 and *Chew Thai Kay & Anor v Tenaga Nasional Bhd* [2020] 7 MLJ 747; [2020] 1 CLJ 97, this court finds that on the facts of the present case that Nordin obtained a specific sanction for the present suit before filing this suit.

**[51]** In the premises, this court rejects Glomac's argument on locus standi.

**[52]** As Nordin has the locus standi and the courts in the previous Suit No 259 decided that Nordin was the true beneficial owner of the said property and Glomac has no rights to or interest in the said property, Nordin has a good and valid cause of action against Glomac.

PAYMENT FOR THE SAID PROPERTY AND BONA FIDES OF THE PRINCIPAL AGREEMENT

**[53]** Among others, the courts in the previous Suit No 259 found and held that:

(a) Nordin had fully paid the purchase price for the said property by way of contra set off;

(b) the contra set off was bona fide and valid; and

(c) Nordin was the true beneficial owner by virtue of having fully paid the purchase price for the said property pursuant to the principal agreement and Glomac has not paid any consideration for the 198 sold units (of which the said property is a unit thereof).

**[54]** This court finds and holds that res judicata applies to bar or estop Glomac from re-litigating the decisions of the courts in the previous Suit No 259.

**[55]** Further or alternatively, issue estoppel applies in the present suit to bar or estop Glomac from questioning the findings of the court in the previous Suit No 259: see principle of issue estoppel in *Malayan United Finance Bhd v Noormurni Sdn Bhd & Anor* [1988] 1 MLJ 395 (SC).

**[56]** In the premises, this court rejects Glomac's argument against the fact that full payment has been made by Nordin for the said property and also dismisses Glomac's argument against the bona fides of the principal agreement or the bona fides of the contra payment.

**[57]** In the previous Suit No 259, the bona fides of the principal agreement was one of the foundational facts of the court's decisions therein. Res judicata in the wider sense applies here to bar or estop Glomac from questioning the bona fides of the principal agreement and the bona fides of the contra payment: see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 CLJ 783 (SC); *Hoystead v Commissioner of Taxation* [1926] AC 155 at pp 165–166 (PC).

CONCLUSION

**[58]** By reason of the aforesaid, this court has held and concluded that Nordin, as the true owner of the said property, is entitled to have the title of the said property transferred to him free from encumbrances and also the vacant possession of the said property.

**[59]** Accordingly, this court on 15 September 2020 granted the following orders and reliefs in favour of the plaintiff Nordin:

(a) a declaration that the plaintiff is the legal and beneficial owner of a two and half (2 1/2) story linked house known as Lot No 69, (Jalan Metro 1/10A) measuring approximately 153 sqmt in the Austral Yarra Link housing development ('said property') which was purchased by way of a sale and purchase agreement dated 15 January 2010 between the plaintiff, Austral Development Sdn Bhd (Company No 638830-A) and Score Option Sdn Bhd (Company No 550356-V);

(b) an order that within 28 days of this order the defendant take all steps required to vest the legal and beneficial ownership of the said property on the plaintiff by executing all necessary documents including but not limited to the memorandum of transfer (Form 14A) in favour of the plaintiff;

(c) an order that if the defendant fail to coply with prayer No 2 hereinabove within 28 days of this order, the deputy registrar of the Shah Alam High Court is authorised to execute all necessary legal documents including but not limited to the memorandum of transfer (Form 14A) in favour of the plaintiff to vest the legal and beneficial ownership of the said property on the plaintiff;

(d) an order that the defendant within 28 days of this order forward to the plaintiff's solicitors all security documents including but not limited the issue document of title and any other document necessary to vest the legal and beneficial ownership of the said property on the plaintiff;

(e) an order that within 28 days of this order the defendant deliver vacant possession of the said property to the plaintiff; and

(f) the defendant Glomac is given the liberty to apply for extension of time

for orders 2, 4 and 5 above in the event of occurrence of any impossibility or inability to comply with the 28 days time frame stipulated above.

**[60]** After hearing the counsel for the respective parties, this court assessed and awarded costs in favour of the plaintiff/Nardin in the sum of RM20,000 for encl 1 (originating summons).

*The plaintiff's claim allowed with costs of RM20,000.*

Reported by Mohd Kamarul Anwar